

Before the
Federal Communications Commission
Washington, DC 20554

SEP 26 10 17 AM '03
DISC
DOCKET FILE COPY ORIGINAL

In the Matter of)	
)	
Requests for Review of the)	
Decisions of the)	
Universal Service Administrator by)	
)	
Kawerak, Inc.)	
Nome, Alaska)	
)	
Native Village of Elim	)	Health Care Provider No. 10687
Elim, Alaska)	
)	
Native Village of Koyuk	)	Health Care Provider No. 10690
Koyuk, Alaska)	
)	
Native Village of Saint Michael	)	Health Care Provider No. 10692
Saint Michael, Alaska)	
)	
Native Village of Shaktoolik	)	Health Care Provider No. 10694
Shaktoolik, Alaska)	
)	
Native Village of Shishmaref	)	Health Care Provider No. 10695
Shishmaref, Alaska)	
)	
Stebbins Community Association	)	Health Care Provider No. 10697
Stebbins, Alaska)	
)	
Native Village of Teller	)	Health Care Provider No. 10698
Teller, Alaska)	
)	
Native Village of Unalakleet	)	Health Care Provider No. 10699
Unalakleet, Alaska)	
)	
Native Village of Wales	)	Health Care Provider No. 10701
Wales, Alaska)	
)	
Native Village of Diomedes	)	Health Care Provider No. 10702
Diomedes, Alaska)	
)	
Native Village of White Mountain	)	Health Care Provider No. 10703
White Mountain, Alaska)	
)	

Native Village of Brevig Mission	)	Health Care Provider No. 10745
Nome, Alaska)	
)	
Federal-State Joint Board on	)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the	)	CC Docket No. <u>97-21</u>
National Exchange Carrier Association, Inc.)	

ORDER

Adopted: September 22, 2003

Released: September 23, 2003

By the Wireline Competition Bureau:

1 The Wireline Competition Bureau has under consideration two Requests for Review filed by Kawerak, Inc. (Kawerak) filed on behalf of twelve tribal government offices seeking discounts under the rural health care universal service support mechanism.¹ Kawerak seeks review of the determination of the Rural Health Care Division (RHCD) of the Universal Service Administrative Company (Administrator) that Kawerak is not eligible to receive discounts because it is not a "health care provider" as defined by section 254(h)(7)(B) of the Communications Act of 1934, as amended (Act).² In its Requests for Review, Kawerak argues that the twelve offices seeking discounts are offices of the tribal villages, and that these offices qualify as eligible health care providers under the Act because they are the tribal equivalent of "local health departments or agencies," one of the categories included in the Act's definition of "health care provider."³ We find that the statutory term "local health departments or agencies" does encompass health departments or agencies established by tribal governments as well as those established by municipal governments. However, we decline to determine, at this time, whether the particular tribal offices seeking discounts here are, in fact, health departments or agencies because this factual question was not addressed in the RHCD decisions on appeal. Instead, we remand the pending applications to RHCD to determine whether the particular tribal

¹ See *Request for Review of the Decision of the Universal Service Administrator by Kawerak, Inc.*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed March 9, 2001 (Year 1999 Request for Review); *Request for Review of the Decision of the Universal Service Administrator By Kawerak, Inc.*, CC Docket Nos. 96-45 and 97-21, Request for Review, filed February 23, 2001 (Year 2000 Request for Review). In prior years, these funding years were referred to as Funding Year 2 and Funding Year 3. Funding periods are now described by the year in which the funding period starts. Thus the funding period that began on July 1, 1999 and ended on June 30, 2000, previously known as Funding Year 2, is now called Funding Year 1999. The funding period which began on July 1, 2000 and ends on June 30, 2001 is now known as Funding Year 2000, and so on.

² See Year 1999 Request for Review, Year 2000 Request for Review; see also 47 U.S.C. § 254(h)(7)(B). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c). According to Kawerak, it has a dual identity. It is both a consortium of tribal governments recognized by the federal government and a non-profit corporation under Alaska state law. Year 1999 Request for Review at 2.

³ Year 1999 Request for Review at 1-2, Year 2000 Request for Review at 7-9.

offices at issue here qualify as health departments or agencies, and for such further review as is appropriate and consistent with this Order.

A. Background

2 In section 254 of the Act, Congress directed telecommunications carriers "[to] provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State, at rates that are reasonably comparable to rates charged for similar services in urban areas in that State."⁴ The Commission implemented this statutory directive by adopting the rural health care support mechanism in the 1997 *Universal Service Order*.⁵ Under the rural health care universal service support mechanism, eligible rural health care providers and consortia that include eligible rural health care providers may apply for discounts for eligible telecommunications services.⁶

3. To obtain discounted telecommunications service under the rural health care universal service mechanism, the Commission's rules require that the rural health care provider make a bona fide request for telecommunications services by filing with the Administrator an FCC Form 465.⁷ The FCC Form 465 is posted to RHCD's website for all potential competing telecommunications carriers to review.⁸ After the FCC Form 465 is posted, the applicant must wait at least 28 days before entering an agreement for services and submitting an FCC Form 466, which verifies the type of services ordered and certifies that the telecommunications carrier selected is the most cost effective, and an FCC Form 468, on which the chosen telecommunications carrier verifies the type of telecommunications service being provided and provides the data necessary for RHCD to calculate the appropriate discount.⁹ RHCD reviews the applications that it receives and issues funding decisions in accordance with the Commission's rules.

⁴ See 47 U.S.C. §§ 151 *et seq.* (adding 47 U.S.C. § 254(h)(1)(A) to the Act).

⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000), *cert denied*, *AT&T Corp. v. Cincinnati Bell Tel. Co.*, 120 S. Ct. 2237 (June 5, 2000), *cert dismissed*, *GTE Service Corp. v. FCC*, 121 S. Ct. 423 (November 2, 2000).

⁶ 47 C.F.R. §§ 54.601(a)(1), 54.601(c)(1).

⁷ 47 C.F.R. § 54.603(b), Health Care Providers Universal Service, Description of Services Requested and Certification Form, OMB 3060-0804 (March 2000) (FCC Form 465).

⁸ 47 C.F.R. § 54.603(b)(1), *see also* RHCD Website, "Process Overview," <http://www.rhcd.universalservice.org/overview/processoverview.asp#7> (Process Overview).

⁹ 47 C.F.R. §§ 54.603(b)(3), 54.603(b)(4), 54.615(c), Health Care Provider Universal Service, Funding Request and Certification Form, OMB 3060-0804 (March 2000) (FCC Form 466); Health Care Provider Universal Service, Telecommunications Carrier Form, OMB 3060-0804 (March 2000) (FCC Form 468); *see* Process Overview.

4. Only entities meeting the definition of "health care provider" are eligible to receive discounted services under the rural health care universal service support mechanism.¹⁰ A "health care provider" is defined in the Act as:

- (i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;
- (ii) community health centers or health centers providing health care to migrants;
- (iii) local health departments or agencies;
- (iv) community mental health centers;
- (v) not-for-profit hospitals;
- (vi) rural health clinics; or
- (vii) consortia of health care providers consisting of one or more entities described in clause (i) through (vi).¹¹

5. At issue here are twelve FCC Forms 465 filed by Kawerak in Funding Year 2000.¹² Each of the twelve Funding Year 2000 FCC Forms 465 listed as the recipient health care provider an office located in one of the twelve tribal villages, and specified that this health care provider was eligible for discounts as a community mental health center.¹³ Kawerak was listed as the applicant contact.¹⁴ These Funding Year 2000 FCC Forms 465 were initially posted to RHCD's website for competitive bidding, but on December 5, 2000, RHCD issued a decision rescinding the posting of all twelve FCC Form 465s.¹⁵ RHCD stated that, based on the nature of the services that Kawerak delivered and the information available on Kawerak's website, RHCD had determined that Kawerak did not qualify as a community mental health center.¹⁶

¹⁰ 47 C.F.R. § 54.601(a).

¹¹ 47 U.S.C. § 254(h)(7)(B), *see also* 47 C.F.R. § 54.601(a)(2) (defining eligible health care provider as the seven categories enumerated in the statutory definition).

¹² FCC Form 465, Elim Office, Health Care Provider (HCP) No. 10687, posted July 24, 2000 (Elim Form 465); FCC Form 465, Koyuk Office, HCP No. 10690, posted July 24, 2000; FCC Form 465, St. Michael Office, HCP No. 10692, posted July 24, 2000; FCC Form 465, Shaktoolik Office, HCP No. 10694, posted July 24, 2000; FCC Form 465, Shishmaref Office, HCP No. 10695, posted July 24, 2000; FCC Form 465, Stebbins Office, HCP No. 10697, posted July 24, 2000; FCC Form 465, Teller Office, HCP No. 10698, posted July 24, 2000; FCC Form 465, Unalakleet Office, HCP No. 10699, posted July 24, 2000; FCC Form 465, Wales Office, HCP No. 10701, posted July 24, 2000; FCC Form 465, Diomedes Office, HCP No. 10702, posted July 24, 2000; FCC Form 465, White Mountain Office, HCP No. 10703, posted July 24, 2000; FCC Form 465, Brevig Mission Office, HCP No. 10745, posted July 24, 2000.

¹³ *See, e.g.*, Elim Form 465.

¹⁴ *See, e.g., id.*

¹⁵ Letter from Rural Health Care Division, Universal Service Administrative Company, to Thomas J. Bunger, Kawerak, Inc., dated December 5, 2000.

¹⁶ *Id.* at 1-2.

Interpreting the recipient offices to be branch locations of Kawerak, RHCD therefore found these offices also ineligible.¹⁷

6 Kawerak filed an appeal with RHCD, in which it argued that the offices qualified as local health departments, as well as community mental health centers, and "possibly" community health centers.¹⁸ On January 24, 2001, RHCD denied the appeal, affirming its prior determination that the Kawerak sites were ineligible for support.¹⁹ It found that Kawerak had, on its FCC Forms 465, represented that it qualified as a "community mental health center," that RHCD had provided Kawerak with an opportunity to present evidence demonstrating that it could qualify as a community mental health center, and that Kawerak had not been able to provide such evidence.²⁰ RHCD also concluded that Kawerak had failed to show that the twelve sites were eligible for discounts under the "local health department or agency" category.²¹ RHCD noted that Kawerak, although performing some of the functions of a social service agency, "does not appear [to] be or to represent itself to the public as a 'local health department or agency' . . ."²² RHCD concluded that "[b]ecause Kawerak acknowledges that it does not meet the only known regulatory definition of community mental health center, and that Kawerak only claims that it is a functional equivalent of a 'local health department or agency,' rather than actually being a 'local health department or agency' as that term is understood by the FCC, . . . Kawerak does not qualify as an eligible entity for support."²³ Kawerak then filed a Request for Review with the Commission.²⁴

7. Also at issue is an application filed in Funding Year 1999 on behalf of one of the twelve offices, the Unalakleet Office.²⁵ Initially, RHCD denied support on the grounds that Kawerak had failed to timely file an FCC Form 466 and 468.²⁶ Later, RHCD issued a new decision, stating that the FCC Forms 466 and 468 had been timely filed, and that the application was instead denied because the Unalakleet Office was not a community mental health center, and

¹⁷ *Id*

¹⁸ Letter from Bruce Baltar, Kawerak, Inc. to Rural Health Care Division, Universal Service Administrative Company, dated December 28, 2000 (Appeal to RHCD), at 2.

¹⁹ Letter from Rural Health Care Division, Universal Service Administrative Company, to Bruce Baltar, Kawerak, Inc. dated January 24, 2001 (Administrator's Decision on Appeal).

²⁰ *Id* at 1

²¹ *Id* at 2-3

²² *Id* at 2

²³ *Id* at 3

²⁴ Year 2000 Request for Review

²⁵ Year 1999 Request for Review

²⁶ See Letter from Rural Health Care Division, Universal Service Administrative Company, to Thomas J. Bunger, Kawerak, Inc., dated January 18, 2001

thus did not qualify as an eligible health care provider.²⁷ Kawerak then filed a Request for Review with the Commission (Year 1999 Request for Review) seeking review of this decision, referring to the arguments that it made in the Year 2000 Request for Review, and asking that the two appeals be consolidated.²⁸

B. Discussion

8 In its Requests for Review, Kawerak argues that RHCD erred in determining that the offices are not eligible health care providers. First, Kawerak argues that RHCD, in treating the sites as offices of Kawerak, misunderstood the nature of the offices.²⁹ Kawerak asserts that each office is an office of one of the twelve tribal villages.³⁰ Kawerak further argues that these tribal offices are the tribal equivalent of health and human service departments for the communities in which they are located because of the services that they provide, such as family and mental health counseling, drug and alcohol screening, and tribal administrative oversight of local health clinics.³¹ Kawerak argues that the offices thus fall within the definition of eligible health care providers under the Act as “local health departments and agencies.”³²

9 We first address Kawerak’s argument that, contrary to the findings of RHCD, the recipient offices are offices of the tribal villages, not offices of Kawerak. This assertion is critical, because Kawerak does not claim that it is, itself, a local health department or agency.³³ After reviewing the record, we are persuaded that the sites are tribal offices rather than Kawerak offices.³⁴ It is true that there was some evidence indicating that these offices were remote sites of Kawerak. For example, the FCC Forms 465 described the requested telecommunications services, which would act as a communications link between the offices and Kawerak’s main office in Nome, as “connect[ing] remote sites to central site to share resources and data”³⁵ Further, it is undisputed that the offices are operated in part by Kawerak employees and funded

²⁷ See Letter from Rural Health Care Division, Universal Service Administrative Company, to Thomas J. Bunger, Kawerak, Inc., dated February 7, 2001.

²⁸ Year 1999 Request for Review at 1-2.

²⁹ Year 2000 Request for Review at 2.

³⁰ *Id.*

³¹ *Id.* at 5. Kawerak has not maintained its earlier assertion that the offices are eligible as “community mental health centers” or “community health centers.” See Year 2000 Request for Review at 2 (presenting, as the sole issue, “[w]hether RHCD-USAC erred in concluding that the twelve tribal government offices . . . are not eligible . . . as ‘local health departments and agencies’ pursuant to 47 [U.S.C.] § 254(H)(5)(B)(iii).”). Accordingly, we do not address whether the offices satisfy those alternative categories.

³² Request for Review at 8-9.

³³ Year 2000 Request for Review at 8.

³⁴ We therefore need not address whether Kawerak itself is an eligible entity.

³⁵ See, e.g., Form 465 at 3.

in part by Kawerak.³⁶ However, we also note that the FCC Forms 465 clearly contemplated that each office was an independent and distinct health care provider, because each office obtained its own identifying health care provider number (HCP number), all of which differed from the HCP number that Kawerak obtained for itself, and each FCC Form 465 referred to the office's HCP number as the entity receiving discounted service rather than Kawerak's HCP number.³⁷ Further, the record demonstrates that the offices are owned by the tribes, that employees at each office include both tribal and Kawerak employees, and that all of these employees, whether paid by Kawerak or the tribe, work under the day-to-day supervision of the local tribal council, not Kawerak.³⁸ After considering this record, we find that, although Kawerak is involved in the provision of services from the offices in question, these offices should nevertheless be considered offices of the individual tribal governments rather than offices of Kawerak.

10. Having concluded that the entities seeking service are offices of tribal governments, we must address Kawerak's argument that these offices are eligible for discounts because they are the tribal equivalent of local health departments. This argument raises two questions: (1) whether the statutory term "local health departments or agencies" as used in section 254(h)(7)(B)(iii) of the Act includes health departments or agencies created by tribal governments; and (2) whether the particular tribal offices at issue in fact constitute health departments.

11. Addressing the first question, we initially note that the Act does not define the term "local health departments and agencies," and that the use of the term "local" does not unambiguously indicate that only state and municipal government departments and agencies may qualify. Although the term "local" may often be used to refer to municipal governments operating under State authority, Congress has also used the term "local" to refer to both municipal and tribal government agencies.³⁹

12. In resolving this ambiguity, we are guided by the Commission's determination in the *Universal Service Order* that the statutory terms referenced in the Act's authorization of universal service support for rural health care providers should be given a "broad reading."⁴⁰ The Commission found that broadly interpreting these terms was "consistent with the purpose of section 254(h)[,] which, as Congress has stated, is, in part, 'to ensure that health care providers for rural areas . . . have affordable access to modern telecommunications services that will enable

³⁶ Appeal to RHCD at 2, *see also* Year 2000 Request for Review at 4.

³⁷ *See, e.g.*, Elim Form 465 at 2. The HCP number for Kawerak is HCP 10704, which differs from the HCP numbers of the individual offices that were used in the relevant FCC Forms 465. *See supra*, n.12.

³⁸ *See* Appeal to RHCD at 2, Year 2000 Request for Review at 4-5.

³⁹ *See, e.g.*, 18 U.S.C. § 1169(c)(4) (defining "local law enforcement agency" as "Federal, tribal, or State law enforcement agency that has the primary responsibility for the investigation of an instance of child abuse within the portion of Indian country involved"), 20 U.S.C. § 5502(5) (stating that "local education agency . . . shall include any tribal education agency"), 29 U.S.C. § 705(25) (defining "local agency" as "an agency of a unit of general local government or of an Indian tribe")

⁴⁰ *Universal Service Order*, 12 FCC Rcd at 9100, para. 618.

them to provide medical . . . services to all parts of the nation.”⁴¹ Here, we similarly find that reading the term “local health care departments or agencies” broadly to include tribal departments as well as municipal departments furthers Congress’s goal of ensuring support to “all parts of the nation,” because it will help to ensure that support for local public health services, whose importance to local communities has also been previously noted by the Commission, is available in tribal as well as in non-tribal communities in this country.⁴² This interpretation is consistent with relevant policies that informed the Commission’s analysis in the *Twelfth Report and Order*, in which it addressed access to telecommunications services on tribal lands.⁴³

13. In the instant case, interpreting “local health department” to include tribal health departments, thus permitting such departments to receive support under the rural health care universal service mechanism, is similarly consistent with these policies. It will directly support tribal self-governance by assisting tribal governments in the execution of health-related public functions and will help to provide tribal communities with a critical bridge to quality medical services.

14. In sum, we conclude that, in light of the goal of the rural health care universal service provision noted previously by the Commission, and consistent with the federal trust relationship between the federal government and federally-recognized Indian tribes, the term “local health departments or agencies” as used in section 254(h)(7)(B) should be interpreted to include health departments or agencies established by tribal governments.

15. To determine the eligibility of the particular tribal offices at issue here, it must still be determined whether they are in fact health departments for the tribes. This question has not yet been addressed by RHCD. In the Administrator’s Decision on Appeal, RHCD concluded that the offices seeking services were merely branch offices of Kawerak, and so determined only that the offices were ineligible because Kawerak did not itself qualify as a local health department.⁴⁴ Thus, there has been no determination by RHCD as to whether the tribal offices as separate entities operating pursuant to the authority of the tribal governments qualify as local

⁴¹ *Id.* (quoting Joint Explanatory Statement of the Committee of the Conference (H.R. Rep. No. 458, 104th Cong., 2d Sess.) at 132)

⁴² See *Universal Service Order*, 12 FCC Rcd at 9099, para. 617.

⁴³ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Twelfth Report and Order*, 15 FCC Rcd 12208 (2000) (*Twelfth Report and Order*). While relying on statutory authority found in various provisions of the Act, the Commission also sought to issue rules that would be consistent with its “obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance.” *Twelfth Report and Order*, paras. 5, 20, 23. It found that, by enhancing tribal communities’ access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, the Commission could increase tribal communities’ access to education, commerce, government, and public services.” *Id.*, para. 5. The Commission also found that “by helping to bridge physical distances between low-income individuals living on tribal lands and the emergency, medical, employment, and other services that they may need, our actions further our federal trust responsibility to ensure a standard of livability for members of Indian tribes on tribal lands.” *Id.*

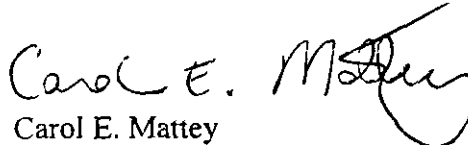
⁴⁴ Administrator’s Decision on Appeal at 2.

health departments. We find it appropriate to leave this determination for RHCD to make in the first instance, and therefore remand the pending applications to RHCD for such a determination, and for all appropriate further review.

16. ACCORDINGLY, IT IS ORDERED, pursuant to the authority delegated under sections 0.91, 0.291, and 54.722(a) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 54.722(a), that the Request for Review filed on February 23, 2001 by Kawerak, Inc. on behalf of Health Care Providers No. 10687, 10690, 10692, 10694, 10695, 10697, 10698, 10699, 10701, 10702, 10703, and 10745, IS GRANTED, and these applications are REMANDED to RHCD for further review.

17. IT IS FURTHER ORDERED that the Request for Review filed on March 9, 2001 by Kawerak, Inc. on behalf of Health Care Provider No. 10699 IS GRANTED, and this application is REMANDED to RHCD for further review.

FEDERAL COMMUNICATIONS COMMISSION



Carol E. Matthey
Deputy Chief, Wireline Competition Bureau